Supreme Court, U.S.
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No. ____

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Sameth Svay, *Petitioner*,

v.

City of Atlanta, *et al.*, *Respondents*, and;

Lieu Uy, *Petitioner*,

v.

City of Atlanta, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a deprivation of a Fourth Amendment right, redressable under 42 U.S.C. § 1983, exists where police officers acting under color of law conspire to, and cause a malicious prosecution?

2. Whether, under the Fourth Amendment and 42 U.S.C. § 1983, respondent police officers acting under color of law are responsible for intentionally and/or recklessly creating circumstances whereby other police officers are required to use otherwise unnecessary and unreasonable deadly force, consequently causing serious injury?

3. Whether evidence of a code of silence and deficient internal investigation within a law enforcement agency during and after an unlawful beating and shooting by the agency's officers is sufficient to establish municipal liability under 42 U.S.C. § 1983?

Subissues to the three preceding questions include whether petitioners have presented sufficient evidence to withstand summary judgment on the claims set forth above, and whether the respondent police officers who shot Sameth Svay were improperly granted summary judgment on Svay's excessive force and false arrest claims.

PARTIES TO THE PROCEEDING

Respondent Atlanta Police Officers, R. L. Ferguson, A.C. Hayes, D.K. Entrekin, W.M. Morlock, W.D. Jackson, and M.A.C. Wadley in their individual and official capacities, are defendants in the action brought by petitioner Sameth Svay, and are respondents to the instant petition.

Respondent City of Atlanta is defendant in each of the separate actions brought by petitioners Sameth Svay and Lieu Uy and respondent to the instant petition.

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Petitioners Sameth Svay and Lieu Uy respectfully request that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Eleventh Circuit in their respective cases.

OPINIONS BELOW

Petitioner is unaware of any citations responsive to the requirements of Supreme Court Rule 14(d).

STATEMENT OF JURISDICTION

The judgments of the 11th Circuit Court of Appeals regarding both cases (*i.e.*, *Lieu Uy* and *Svay*) were entered on August 7, 1997. There are no pertinent orders respecting rehearing. Original jurisdiction is conferred on the United States District Court in this matter under 28 U.S.C. § 1343(a)(3) and (4). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . .

42 U.S.C. § 1983 [Originally the Civil Rights Act of 1871] provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF FACTS

Petitioner Sameth Svay -- a Laotian native who is married with four children, an Air Force veteran and an employee of 15 years with the Cleveland Electric Company, with no prior adverse contacts with law enforcement -- was wrongfully shot, falsely arrested and maliciously prosecuted by members of the Atlanta Police Department.

Petitioner Lieu Uy -- a person of Vietnamese-Chinese origin who is married with two children and who, like Sameth Svay, had no prior adverse contacts with law enforcement -- returned from his job as a cook to the scene where Svay was shot, was removed from his vehicle and viciously beaten by Atlanta Police Officers, then released without being charged. Initially, the Atlanta Police Department denied any officer involvement in the beating, then subsequently recanted the denial.

Messrs. Svay and Lieu Uy petition from the Eleventh Circuit which upheld the district court's grants of summary judgment in both cases.

These petitioners urge this Court to exercise its discretion in favor of review, not only because of the major conflicts among the circuits addressed herein and outlined below, but to rectify what petitioners assert is a grave injustice perpetuated by the lower court rulings.

On the evening of May 7, 1993, three plainclothes Atlanta Police Officers, Jackson, Entrekin and Wadley drove into the parking lot of a predominately Asian apartment complex which the Atlanta Police Department knew was subject to a rash of autoburglaries. The three officers were there ostensively to serve a search warrant on a suspected small-time Vietnamese dice game which

the officers suspected -- based upon complaints by the apartment manager of traffic congestion and the reports of a confidential informant -- was run from an apartment near the front of the building.

Contrary to the Atlanta Police Department's policy of having at least one uniformed officer present when serving a search warrant, the officers acted alone in hopes of skimming cash confiscated during the search. [The basis of this allegation is discussed *infra*.]

Consistent with their plan, the three officers began surreptitiously lurking around and about the parking lot in back of the predominately Asian apartment complex, attempting to see if the game was up and running. This was an obvious tactical blunder in that three officers -- two of whom are black and one white -- were immediately misidentified and suspected by the Asian residents as intruders.

Naturally, residents became alarmed, neighbors called neighbors and the police, and petitioner Sameth Svay, along with three other neighbors armed themselves and together walked towards the men in the parking lot, believing that they would otherwise be victimized. One officer, sensing that the men were confused by the officers' surreptitious presence, made contact with Sameth Svay and showed him his badge. Svay acknowledged the officer, indicated that he now recognized them as officers and, relieved, placed his 9 mm into his waistband and attempted to retreat.

However, at the same time, another officer panicked, yelled regarding another person carrying a rifle words to the effect that "He's got an AK" and opened fire on the Asian males.

Defendants deny that the officers opened fire and the APD's shooting report blames one of the Asian males

for opening fire. However, the deposition testimony of W.D. Jackson, the officer who yelled "He's got an AK" is, at best, ambiguous regarding who opened fire. (Jackson's unreliability is addressed in detail, *infra.*)

What followed was a barrage of shooting, reloading, and more shooting, almost exclusively by the Atlanta Police Department (the subsequent ballistics report indicates that the rifle was fired twice; Svay's 9 mm was never fired). Numerous, terrified residents called 911 and described the police officers as the perpetrators. Meanwhile, one of the Atlanta Police Officers called for back-up, misdescribing *all four* Asian gentleman as suspects

Two uniformed officers, Ferguson and Hayes, subsequently arrived at the front of the building and, approaching from different angles through a courtyard between two buildings, shot Sameth Svay on the doorstep of his apartment as he was attempting to retreat into his apartment. After he was shot, Svay reached into his waistband pursuant to the officers' orders and threw the weapon away from his body. Shortly thereafter, he fainted as his wife -- watching from the window -- also fainted. Simultaneously, his daughter -- also watching from the window -- pled for mercy with the 911 operator. Thereafter, two uniformed officers dragged him by the armpits approximately 300 feet through area secured by the Atlanta Police Department to the street where paramedics placed him in an ambulance and took him to a nearby hospital.

In the midst of this incident, Lieu Uy returned from a 14-hour day as a cook in a Chinese restaurant. After pulling his automobile into a parking space, officers ordered him to stay in his car. He complied. After the shooting was complete, SWAT officers in the presence

of, and with the participation of at least one of the three plainclothes officers swept the area, which included pulling Lieu Uy from his car and seriously beating him. After the beating, which Lieu Uy described in has native language as "wolves having found their prey," an officer handcuffed him and dropped him face down in the parking lot where he remained for approximately 30 minutes, until another officer finally asked who the person was and, finding no connection to the incident, unhandcuffed him. Terrified and injured, Lieu Uy retreated into his apartment.

Atlanta Police Department Investigator W.M. Morlock -- who arrived on the scene to conduct the shooting investigation -- interviewed together the two officers that shot at Svay, instead of separating them as is done in *any* investigation other than an officer involved shooting. Neither statement was tape-recorded because tape-recording officers involved in shootings was prohibited as a matter of policy, forged from an agreement between the City of Atlanta and its police officers' union.

Notwithstanding that the two officers, Ferguson and Hayes, were standing in different locations across from one another in the courtyard, each officer gave an almost identical statement that Svay raised his 9 mm and pointed it at themselves. Svay expressly denies pointing a weapon at anyone and indicates that he did not take the gun out of his wasteband until after he was shot, and in compliance with what he thought were the officers' orders.

Nor does defendants' story make logical sense: *i.e.*, that Svay would place the gun half-way into his waist-band after acknowledging one officer's display of his badge, then sit-out the approximately twenty-five to

thirty rounds fired by the other officers, retreat to his apartment, and only then, as he reached his front door, decide to join the so-called "gun-fight," pull out his unfired weapon and point it into the darkness towards were Ferguson and Hayes were descending upon him.

Hours after the beating, someone who spoke with Lieu Uy's family apprised an Atlanta Police Department Lieutenant, Ackley, who subsequently arrived on the scene of Lieu Uy's condition. Lieutenant Ackley went into Lieu Uy's apartment and, after discussing the matter with him, arranged to have a crime-scene photographer take photos of his injuries. Thereafter, Ackley arranged to have Lieu Uy transported by paramedics to a nearby emergency room. The photos were placed into the investigative file regarding the Svay shooting.

Four arrests were made. Sameth Svay was charged with *aggravated assault* and *carrying a concealed weapon*. Three other persons, Sam Luy, Kim Luy and Saey Voun were arrested and charged with *commercial gambling* and *aggravated assault*. Svay's preliminary hearing was delayed and conducted separately because he was in the hospital recovering from his gunshot wound to his leg.

At the preliminary hearing concerning Svay, the evidence is overwhelming that Jackson knowingly committed perjury in order to perpetuate a malicious criminal prosecution of Svay. His perjury becomes clear by comparing his testimony at the two preliminary hearings, his deposition testimony, and his statements to the shooting investigators, all of which are irreconcilable.

At the first hearing on May 18, 1993 in the matter of *State of Georgia v. Sam Luy, Kim Luy, Saey Voun*, W.D. Jackson testified that he identified Kim Luy as the Asian male who *raised* an AK 47, started backing up,

and fired two rounds. When asked whether the guy with the AK was the person in the hospital, Jackson replied, "No sir. The one in the hospital was armed with a 9 mm."

Based on Jackson's testimony, the San Luy was bound over on charges of aggravated assault.

In the first half of his deposition on August 29, 1995, Officer Jackson reiterated that he saw muzzle fire from the Asian male who carried and shot a weapon that looked like an AK-47 [*i.e.*, Kim Luy]. Jackson fired back at that Asian male approximately 16 to 17 times, stopping once to reload. He did not see any other Asian male firing their weapons.

Discounting the possibility that he was confused regarding identities, Jackson testified that he was able to distinguish among the Asian males in the parking lot by what they were wearing and their weapons. Jackson added that he did not see the Asian Male who was shot [*i.e.*, Svay] get shot.

At the second preliminary hearing on June 18, 1993 in the matter of *State of Georgia v. Saneth* [*sic*] *Savy* [*sic*], conducted after Svay was released from the hospital, it was again W. D. Jackson who testified for the prosecution.

This time, however, Jackson testified that it was Svay, not Luy, who opened fire. Jackson stated that after Svay ran towards a stripped multi-colored van, he shot his 9 mm approximately two times in the direction of Jackson, Wadley and Entrekin.

Contrary to his testimony in the first preliminary hearing, Jackson testified in the second hearing that it was *not* true that his attention was focused on the guy with the AK 47 when the shooting began. Instead, it was focused on Svay. He added that he saw muzzle flash

from Mr. Svay's weapon when he fired (notwithstanding that 9 mm's do not emit a muzzle flash and ballistics indicate Svay's 9 mm was never fired during the incident).

Jackson added that when officers asked Svay to stop and drop the gun, Svay turned and fired upon them (again, contradicting the ballistics evidence and his own prior testimony). When asked the basis of the concealed weapons charge, Jackson responded that when other officers captured him, Svay stuck the 9 mm in his pants and, when the officers asked him to drop it, he pulled it out in front of them.

Based on Jackson's testimony, Svay was bound over.

In the second half of his deposition on August 29, 1995, Officer Jackson could not recall testifying that Sameth Svay, the Asian with a 9 mm leveled his gun and fired at Jackson. He reiterated that he never saw anybody with a 9 mm shooting during the incident and that he never saw muzzle flash from any gun other than the gun he took to be an AK-47.

Discounting the possibility of confusion, Jackson remembered that there were two preliminary hearings because the hearing for the gentleman that was shot was delayed because he was hospitalized. Further, he understood that the purpose of that preliminary hearing was to determine whether the Asian gentleman with the AK 47 should be bound over. Thus, he was aware that he was testifying regarding a different Asian gentleman at each of the two preliminary hearings.

After reviewing his testimony at the first preliminary hearing regarding the Asian male with the AK 47 in the August 29, 1995 deposition, Jackson reasserted that the preliminary hearing testimony was

accurate.

However, after reviewing his testimony at the second preliminary hearing, Jackson was forced to concede that he did not witness Svay run back towards his apartment and hear other officers order him to drop his weapon before firing upon him.

Further, Jackson conceded that he did not see a muzzle flash coming from the parking lot by the van, previously identified by Jackson as where Svay had taken cover. Additionally, Jackson conceded that a 9 mm [such as was in plaintiff's possession] does not emit a muzzle flash.

At this point in the deposition, Jackson created a new story, namely, that he *heard* one gunshot, and based thereon surmised that Svay had fired a shot. Further, he stated that his *hearing* the shot was the basis of his prior testimony that Svay had fired his 9 mm.

At this point in his deposition, Jackson professed that he did not know whether he saw anybody shoot from the van (*i.e.*, where he testified Svay shot from during the second preliminary hearing). Nevertheless, he indicated that he did not see a muzzle flash come from the van.

Moments later, Jackson reversed himself, asserting that he did see a flash come from the van.

After reading his testimony at the second preliminary hearing regarding how he had seen shots fired from the van, Jackson was asked again whether he saw the shots or not. This time, Jackson replied that he did not know.

When again confronted with his testimony at the second preliminary hearing that he saw Svay turn towards the officers, fail to drop his weapon and then get shot, Jackson conceded that he did not see this occurrence, either.

However, a few pages later in his deposition, Jackson reversed himself yet again, and testified that he did see Svay turn and point towards the other officers. But, when asked whether he also saw a gentleman by the white Toyota where Svay was purportedly standing shoot, Jackson now replied "No."

When confronted with his contradictory testimony at the second preliminary hearing wherein he said he did see a gentleman by the white Toyota shoot and asked whether it was true, all Jackson could say in response at this point was "Okay."

After further reviewing his testimony at the second preliminary hearing, Jackson said that he determined a gentleman by the white Toyota shot one time because he *heard* the shot come from that direction.

Thereafter, Jackson reversed himself once more and testified that he *saw* the shot from the white Toyota.

Regarding his statements to shooting investigators after the incident, Jackson testified that he told the shooting investigator, Mortlock. that a man by the white Toyota shot at him, that he saw a muzzle flash come from the van and that he saw the man who ran from the van turn a gun on the two officers. He further testified that he did not know whether he told Investigator Mortlock whether the man who was shot shoot at Jackson (as Jackson testified at the second preliminary hearing). But he added that it was *possible* that he told Mortlock that he was sure that Svay was the person who fired at him because he was the one who he saw run from the van and then point his weapon at other officers.

These alleged remarks bear no resemblance to Mortlock's testimony and are entirely contradicted by the brief statement that homicide/shooting investigators took from Jackson on the night of the incident, and signed by

Jackson under penalty of perjury. Jackson's statement indicated that he *never saw any gentleman other than the gentleman with the* AK-47 *shooting at him or his partners*, and the man that was shot, Svay, had what looked like a dark, semiautomatic 9 mm stuck down in his pants, right front.

It is impossible to reconcile Jackson's statement, his testimony at the two preliminary hearings, and at his deposition.

In his statement and the first preliminary hearing, Jackson saw only the man with AK 47 shoot. In the second preliminary hearing, Jackson saw only the man with the 9 mm shoot. In his deposition, he withdrew his story about seeing muzzle fire from the 9 mm, but created a new story that he heard the 9 mm (which ballistics show was never fired). Confronted with the absurdity of this, he changed his story back to seeing the 9 mm firing, then, reversing himself again when confronted with his prior contradictory testimony at the second preliminary hearing, and asserted that he only *heard* the gun (again, which ballistics show was never fired).

Nor is it possible to credibly hypothesize a believable scenario whereby he could have been simply mistaken. Jackson thoroughly understood the nature of the hearings and the purpose of his testimony. Nevertheless, he told two distinct and mutually exclusive stories at two separate hearings regarding a unique and presumptively harrowing and memorable event.

Thus, the evidence presented to the district court is overwhelming that Jackson egregiously committed perjury in order to perpetrate a continued, malicious criminal prosecution of Sameth Svay.

While Svay was facing criminal prosecution of

false charges supported by Jackson's perjury, Lieu Uy, the beating victim, contacted Chinese for Affirmative Action, a San Francisco civil rights organization. On June 11, 1993, Isabel Huie, a Civil Rights Officer for Chinese for Affirmative Action sent a detailed letter to the, then, Police Chief, Eldrin Bell, describing the incident -- including giving the correct date of the incident -- and demanding an investigation. Further, Svay contacted an Atlanta attorney, Stuart Barasch, who also wrote a letter demanding an investigation, again, giving the Atlanta Police Department the correct date of the incident.

On July 16, 1993, an Atlanta Police Department, Office of Professional Standards investigator took a statement from Lieu Uy through a translator wherein the date of incident was typed in incorrectly as March 7, 1993. The statement in English was submitted for Lieu Uy's signature. On the basis of this mistake -- notwithstanding that the correct date was included on the first sheet of the detailed letter by Isabel Huie and the letter by Stuart Barasch -- the City of Atlanta blamed Lieu Uy for its inability to complete the investigation and identify the culpable officers.

Nevertheless, OPS took statements from dozens of the officers on the scene and who had participated in the shooting. However, OPS professed trouble reconciling some of the officers' testimony that Red Dog units where on the scene, with time sheets that recorded that no Red Dog Units were on duty on *March* 7, 1993. Remarkably, OPS never obtained the shooting/homicide report which it knew must have been created and was on file in numerous areas of the department. OPS never contacted Inv. Mortlock who was responsible for the shooting investigation, nor did they confide with Lt. Ackley that they were having problems identifying the culpable

officers. Because OPS never found its way to the homicide/shooting file, OPS never found the photographs of plaintiff's injuries taken in the early morning hours of May 8, 1993.

Notwithstanding that it is obvious to anyone who visits the scene and has familiarized herself with APD officers' various accounts of the incident that the area where and when Lieu Uy was beaten was saturated and surrounded by Atlanta Police Officers, the Atlanta Police Department pointed the finger at other departments as possible culprits, *viz.*, Eastpoint, Hapesville, the Georgia State Patrol and the Fulton County Sheriffs. However, there is no record in the OPS file presented by defendants that indicates that anyone from OPS ever contacted any of these departments or interviewed any of their officers or supervisors.

Defendant City of Atlanta continued to point the finger at other departments in the first filing of this lawsuit, *Lieu Uy v. City of Atlanta*, U.S.D.C. Case No. 1-94-CV-2573-GET. One day before trial was scheduled, facing possible embarrassment at trial, defendant City of Atlanta withdrew this defense and begrudgingly conceded for the first time that Atlanta Police Officers were responsible for pulling Lieu Uy out of the car.

After the district court refused plaintiff's request for a continuance, plaintiff dismissed and refiled the case as is permitted under Georgia law made applicable to the federal proceeding under 42 U.S.C. § 1988.

In deposition testimony subsequent to the refiling, two APD SWAT officers recanted their prior sworn statements that they did not recall pulling any Asian gentleman from a car on the day of the shooting, but contended that any use of force on their part was reasonable. No plain-clothes officer who was present on

the scene has of yet admitted participating in, or seeing the beating as reported by Lieu Uy. Nor do any of the Atlanta Police Officers who were in the vicinity admit participation in, or even witnessing the beating. The APD never reinvestigated the matter and has never issued an apology to Lieu Uy.

Subsequent to his deposition, W.D. Jackson, was arrested, prosecuted and convicted of skimming money he found under the motelroom mattress of what he thought was the girlfriend of a fugitive, but was in reality an undercover FBI agent conducting a sting.

Ultimately, Svay was released from custody and the criminal prosecutions against Sameth Svay, as well as the other three arrestees, were dropped for lack of prosecution. Svay now walks with a permanent limp as a result of the gunshot wound to his knee.

Based upon the foregoing events and circumstances, Sameth Svay brought an action in United States District Court under 42 U.S.C. § 1983 and related state claims alleging a false arrest, excessive force and malicious prosecution against City of Atlanta, Atlanta Police Officers, R. L. Ferguson, A.C. Hayes, D.K. Entrekin, W.M. Morlock, W.D. Jackson, and M.A.C. Wadley in their individual and official capacities.

Likewise, Lieu Uy refiled his action in United States District Court under 42 U.S.C. § 1983 and related state claims alleging excessive force against the City of Atlanta.

Defendants successfully moved for summary judgment in both actions. The Eleventh Circuit upheld the rulings.

In ruling on Svay's motion for summary judgment, the district court framed the issue with respect to the two shooting officers, Ferguson and Hayes, as "whether it was

clearly established law in this circuit that a police officer may not discharge his weapon in the direction of a running man who possesses a gun during a shoot-out between a number of armed civilians and police officers." Unsuprisingly in light of how the court framed the issue, the district court granted summary judgment on grounds of qualified immunity to Ferguson and Hayes.

Regarding Officers Entrekin, Jackson and Wadley, and their liability for creating the need for deadly force, the district court rejected all authority outside the 11th Circuit, holding that there was no authority within the 11th Circuit or the Supreme Court whereby the officers could know that they were violating the law, thereby, holding that the officers were entitled to qualified immunity.

Petitioners presented evidence of Jackson's conviction under F.R.E. 404(b) as proof of motive, opportunity, *modus operandi, etc.*, related to Jackson, Entrekin and Wadley's reason for serving a search warrant alone, without uniformed officers. The court struck this evidence as irrelevant.

In support of petitioners' theory in this regard, petitioners also presented evidence that the testimony of Atlanta police officers noticeably changed after Lt. Ackley conceded in his deposition that eyebrows were raised within the Department regarding why the officers were not accompanied by uniformed officers. The story by pre-Ackley deponents was that the three were in the parking lot, preparing to serve the search warrant. The story by post-Ackley deponents was that they were in the parking lot only to access how many uniformed officers they would need, so they could call and get assistance serving the warrant. The court rejected this evidence *sub silentio*.

Regarding Svay's malicious prosecution claims, the district court held that there was no evidence of a conspiracy to maliciously prosecute Svay. Regarding Svay's malicious prosecution claim against Jackson, the court held that Jackson "may" be entitled to absolute immunity for his statements on the witness stand, and, therefore, was entitled to qualified immunity regarding the malicious prosecution claim against him (*i.e.*, Jackson could not know that he was violating clearly established law as he committed perjury on the stand).

Regarding Svay's claim against the City of Atlanta, the court found "that there is nothing in this record which a jury could reasonably rely upon to render a verdict in plaintiff's favor against the City." The court further held that the only "bit" of evidence Svay presented was that the department does not allow the tape recording of witness's statements to officers while conducting an internal investigation."

Regarding Lieu Uy's claim against defendant City of Atlanta, the district court held that, although Lieu Uy presented sufficient evidence that his Fourth Amendment rights were violated, he "points to no specific facts tending to show that the City maintained a policy, practice or custom which caused Uy's injuries."

REASONS FOR GRANTING THE PETITION

1. SUPREME COURT REVIEW IS REQUIRED TO CLEAR UP CONSIDERABLE CONFUSION AMONG THE CIRCUITS REGARDING THE PARAMETERS OF A FOURTH AMENDMENT MALICIOUS PROSECUTION CLAIM UNDER 42 U.S.C. § 1983

In *Albright v. Olivier*, __ U.S. __, 114 S.Ct. 807 (1994), this Court left unresolved the parameters of the Fourth Amendment right to be free from malicious prosecution.

Most significantly for purposes of petitioner Svay's claim, Justice Ginzburg stated in her opinion that a defendant released pretrial is still "seized" in a constitutionally relevant sense:

> Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court. This conception of a seizure and its course recognizes that the vitality of the Fourth Amendment depends upon its constant observance by police officers. For Oliver, the Fourth Amendment governed both he

> manner of, and the cause for arresting Albright. If Oliver gave misleading testimony at the preliminary hearing, that testimony served to maintain and reinforce the unlawful haling of Albright into court, and so perpetuated the Fourth Amendment violation.
> *Albright*, __ U.S. __, 114 S.Ct. at 816 (Ginsburg, J., concurring).

The state of law regarding whether and when an actionable right under the Fourth Amendment to pursue a section 1983 claim for malicious prosecution exists was at best, confused and variegated among the circuits, prior to *Albright*. After *Albright*, the situation is worsened, so much so that commentators continue to address pre-*Albright* law regarding malicious prosecution in their treatises out of uncertainty where courts will go next. *See, e.g.*, Avery, Rudovsky & Blum, Police Misconduct, Law and Litigation, 3d ed., § 2.10; Nahmod, Civil Rights and Civil Liberties Litigation, 3d ed., §3.15; Schwartz & Kirklin, Section 1983 Litigation, Claims and Defenses, 3d ed, Vol. 1A, § 3.20.

The confusion is so complete that sorting out where the various circuits currently stand would require an analysis beyond the scope of a petition for certiorari. Nevertheless, petitioners commend the court to Justice Newman's erudite opinion in *White v. Frank*, 855 F.2d 956 (2nd Cir. 1988) as the most thoughtful authority on the subject.

The *White* court analyzed pertinent common law immunities against 42 U.S.C. § 1983 in the context of a malicious prosecution action based upon police officer

perjury before a grand jury. It concluded that an officer who is a complaining witness is not entitled to absolute immunity, *i.e.*, "a public prosecutor's role in a criminal prosecution will not necessarily shield a complaining witness from subsequent civil liability where the witness's testimony is knowingly and maliciously false." *White*, 855 F.2d at 962 [cites omitted]. The court quoted two English commentators for the proposition that "[i]t is quite clear that a defendant who has misled a tribunal by dishonest evidence and thereby caused it to act to the prejudice of the plaintiff is liable, even though he may not have purported to be the prosecutor." *Ibid., quoting,* J. Clerk & W. Lindsell, The Law of Torts, ch. XIX, p. 639 (7th ed. 1921).

The instant matter provides a compelling set of facts for resolving the issue and providing guidance to lower courts. After Svay was crippled by the misadventure of reckless officers, he was subjected to a false criminal prosecution that is noteworthy for its flagrant malice. Indeed, the evidence is so overwhelming that Jackson knowingly committed perjury at Svay's preliminary hearing that Svay cross-moved for summary adjudication on the issue simultaneous to opposing defendants' summary judgment motions, only to have the cross-motion rejected on the questionable procedural ground that the filing of the related cross-motion with an opposition to summary judgment was untimely since the cross-motion was past the motion cut-off. Neverthe-less, defendants have never even attempted to explain or justify Jackson's preliminary hearing testimony.

If this event has occurred in 1871, it would have been read into the record of hearings on the Civil Rights Act of 1871 [now 42 U.S.C. § 1983] as a reason why such legislation is necessary.

Now, the enigmatic state of the law is used by courts such as in the instant matter to give defendant officers immunity, even though officers know that committing perjury under oath violates clearly established law.

Petitioner Svay presents clearly delineated facts whereby the Court may resolve whether and under what circumstances a person has a right redressable under 42 U.S.C. § 1983 to vindicate a malicious prosecution, violative of the Fourth Amendment. Failure to address the issue not only denies Svay a right under the Fourth Amendment, it denies Svay and similarly situated persons the consolation of even knowing whether they are afforded such a right.

Accordingly, the Court should grant Svay's petition.

2. THE SUPREME COURT HAS NEVER ADDRESSED THE UNRESOLVED ISSUE AMONG THE CIRCUITS AS TO WHETHER AN OFFICER'S INTENTIONAL OR RECKLESS BEHAVIOR WHICH CAUSES ANOTHER OFFICER'S OTHERWISE UNNECESSARY USE OF DEADLY FORCE IS ACTIONABLE UNDER 42 U.S.C. § 1983

Currently, there is a split among the circuits between those courts which hold that law enforcement officers can be held liable for their intentional or reckless misconduct which creates circumstances whereby otherwise unnecessary deadly force becomes necessary and courts which employ a "last-frame analysis," *i.e.*, so

long as the officers' use of force was reasonable in the moment it was made, blunders leading to the moment are irrelevant to the analysis. *Compare*, *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995) and *Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995); *see generally*, Avery, Rudovsky & Blum, Police Misconduct, Law and Litigation, 3d ed., § 2.18, fn. 14.

Those cases that have held officers responsible for their intentional or reckless endangerment typically concern the same officers who created the circumstances using the deadly force. *Ibid.* Petitioners are unaware of a reported decision which presents circumstances parallel to the instant matter, *i.e.*, where the officers who created the dangerous need for deadly force are different than the officers who actually executed the deadly force.

Last-frame analysis is wholly inconsistent with the "totality of the circumstances" approach which this Court expounded in *Graham v. Conner*, 490 U.S. 386 (1989). In Courts following the last-frame approach, the incongruous consequence is that any circumstance prior to the use of deadly force can be used to justify the intrusion on the person, but the same circumstances may not be used to protect the person from an unwarranted intrusion perpetrated under color of law.

Nor is there a logical reason why intentional and/or reckless blunders in creating a dangerous circumstance cannot be separated analytically from the propriety of a subsequent, split-second use of force. *Cf.*, *Brower v. County of Inyo*, 489 U.S. 593 (1989). Supposing otherwise, results in a rule of law that -- in the courts' effort to reserve to officers freedom to act for their own and others' safety -- does nothing to prevent officers from unreasonably creating dangerous circumstances, leaving the citizens' and fellow officers'

similar safety interests unaccommodated.

The instant matter presents an opportunity for the Court to pronounce a clear rule which both respects officer safety concerns and provides meaningful Fourth Amendment protection against unwarranted intrusion.

Petitioner Svay -- whose greatest sin was his desire to protect his property against an imminent threat, who never assaulted or mislead the officers and tried to retreat from the officers' hail of bullets -- was shot, hospitalized and now suffers a permanent injury to his leg, needlessly.

A well-articulated rule of law has the power of deterring future episodes of reckless tactics, raising professional standards and, quite possibly, saving lives, including the lives of police officers such as two of the APD officers who responded to the scene of the subject incident and nearly walked into friendly fire.

Accordingly, Svay presents compelling reasons why the Court should grant his petition.

3. UNTIL THE SUPREME COURT DIRECTLY ADDRESSES WHETHER CODE OF SILENCE AND RATIFICATION EVIDENCE SUPPORTS A MUNICIPAL LIABILITY CLAIM UNDER 42 U.S.C. § 1983, A VACUUM EXISTS WHEREBY LACK OF UNIFORMITY AND IDIOSYNCRASY AMONG DISTRICT COURTS PREDOMINATES

In the instant matter, the district court, then the Eleventh Circuit rejected three conceptual bases of municipal liability under 42 U.S.C. § 1983 -- bases which

are accepted in other circuits: 1) deprivation of federally protected rights caused by a custom, policy or practice of a *code of silence* among officers; 2) custom, policy or practice established by *ratification* of misconduct by the defendant municipality; and 3) custom, policy or practice established by multiple breakdowns in police procedure during a single event or series of events. Further rejected were numerous discrete facts and inferences wherefrom a jury could conclude that an offending municipal custom, policy and practice caused petitioners' injuries.

In the absence of direct pronouncement by this Court, a vacuum exists whereby judge's individual predilections towards law enforcement and civil rights plaintiffs carry greater weight and predictive power than established case law and rigorous protections of civil rights plaintiffs' right to trial. F.R.C.P. Rule 56 language and logic are undermined by loose generalizations and byzantine explications of what constitutes acceptable evidence of municipal custom, policy and practice.

The *code of silence* is an unwritten rule in law enforcement that officers do not testify or report the truth where the truth tends to hurt fellow officers in the form of supporting potential criminal or civil liability and/or administrative discipline. *See generally*, Avery, Rudovsky & Blum, Police Misconduct, Law and Litigation, 3d ed., § 11:17. This Court addressed *code of silence* issues in dicta in *Brandon v. Holt*, 469 U.S. 464, 467 n. 6, 105 S.Ct. 873, 875 n. 6 (1985).

Since *Brandon*, evidence suggestive of a code of silence has supported determination and/or verdicts favorable to plaintiffs in *Czajkowski v. City of Chicago*, 810 F.Supp. 1428, 1440 (N.D.Ill. 1992); and *McLin v. City of Chicago*, 742 F.Supp. 994 (N.D.Ill. 1990): and, prior to *Brandon*, in *Bonsignore v. City of New York*, 521

F.Supp. 394 (S.D.N.Y. 1981), *aff'd,* 683 F.2d 635 (2nd Cir. 1982) and *Thomas v. City of New Orleans*, 687 F.2d 80 (5th Cir. 1982).

In the instant matter, Lieu Uy and Sameth Svay presented the following evidence:

- Officers Jackson, Entrekin and Wadley all deny seeing the beating of Lieu Uy, however they were the only officers dressed in plain clothes present; Lieu Uy has testified that at least one plainclothes officer participated in the beating.
- Two SWAT officers (Harvey and Whitmire) gave sworn statements that they did not witness any force used against an Asian male, but subsequently recanted.
- A third SWAT officer (Gamble) testified implausibly that, while in the vicinity at the approximate time of the beating, he spent between 15 and 30 minutes securing an empty swimming pool.
- The investigation of the Lieu Uy beating was so purposely incompetent that the internal investigators assigned to the matter never found the shooting report regarding the incident (which would have confirmed that Atlanta Police officers had saturated the area where the Lieu Uy beating took place) nor the police photos of Lieu Uy's injuries which were also contained in the file.
- Instead, the investigation concluded that other law enforcement agencies must have

been involved in the beating, but the investigators never contacted any of these agencies.

- The two shooting officers' formal statement regarding the shooting of Svay appear coached and designed to conformity. In addition to conflicting with Svay who denies ever pointing a weapon at either officer, each officer contends that the weapon was pointed at each other, notwithstanding that the two were standing on opposite sides of the courtyard at the time it is alleged Svay pointed a weapon.
- There was no taped interviews of the shooting officers, pursuant to policy.
- The two officers were interviewed together, before their statements were prepared for them by the Department.
- No interviews were conducted of the civilian witnesses at the scene.
- Instead of Ferguson and Hayes, Jackson testified at the preliminary hearing regarding Svay and committed perjury in order to ensure a malicious criminal prosecution of Svay.

A departmental policy as evidenced by the foregoing is a precondition to misconduct. Officers are emboldened by the support that they anticipate from fellow officers. The recent well-publicized jail-house beating in New York is only the latest example where a latent code of silence precursed officer misconduct.

Regarding the subject incident, in addition to two

incompetent investigations by the Atlanta Police Department, the investigations were not reopened after the investigations' flaws were exposed. There was no retraining, no counseling, no internal questions regarding the officers' flawed tactics, no discipline. The only administrative action was that the two officers who -- after almost walking in the line of their fellow officers' fire -- dragged Svay through hundreds of feet of ground already secured by the officers to the ambulance -- were commended for their heroism. In short, there was a departmental *ratification* of the incidents.

In *Grandstaff v. City of Borger,* 767 F.2d 161 (5th Cir. 1985), *several examples of reckless misbehavior during a single incident* supported a verdict upheld by the Fifth Circuit. Further, the court relied upon a *ratification* theory, pointing to the department's complete failure to adequately investigate the incident or discipline any of the officers involved.

In the instant matter, both the beating of Lieu Uy and the shooting and false arrest of Sameth Svay, conducted by different officers and subject to separate investigations, were excused.

The district court's rejection of Svay's claim -- in light of the court's grant of qualified immunity to the individual officers -- undermined any hope by Svay of recovery.

Regarding Lieu Uy, defendant City of Atlanta was his only defendant because the Department had so effectively shielded throughout the litigation its officers involved in the beating from disclosure. Even today, notwithstanding that the area were Lieu Uy was beaten was saturated with Atlanta Police officers, no one is stepping forward. Nor is there a mayor putting pressure on officers to pierce the blue wall as recently occurred in

New York.

Ironically, while the code of silence in the instant matter made pursuing an action against individual officers impossible, the district court and the reviewing court still does not accept evidence of existent code of silence as the basis of municipal liability.

Similar to Svay, petitioners assert that if the beating of Lieu Uy took place in 1871, the incident would have been published in the record of Congressional hearings leading to the Civil Rights Act of 1871 as justification for what is now 42 U.S.C. § 1983.

Refusal by this Court to address this issue will result in further instances of courts idiosyncratically rejecting claims which embody the essence of why Congress created section 1983. This Court's duty is to enforce the Congressional intent behind this unique and important statute.

Accordingly, a compelling need is presented for the Court to grant the petition as to this third issue as well as the two prior issues.

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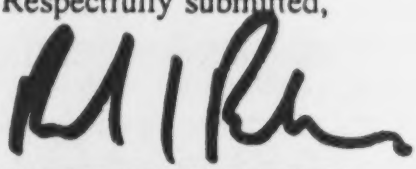
CONCLUSION

The petition presents three issues previously unaddressed by this Court which require this Court's resolution. These issues are presented by two worthy petitioners, deserving of justice.

Consequently, petitioners Sameth Svay and Lieu Uy pray that their petition for writ of certiorari be granted.

Respectfully submitted,



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APPENDIX A -- OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, IN THE MATTER OF *Sameth Svay v. City of Atlanta, et al.*, Case No. 1:95-CV-1174-WBH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SAMETH SVAY,	)	
	)	
Plaintiff,	)	CIVIL ACTION FILE
	)	
v.	)	No. 1:95-CV-1174-WBH
	)	
CITY OF ATLANTA,	)	
CITY OF HAPEVILLE,	)	
CITY OF EASTPOINT,	)	
FULTON COUNTY, R.L.	)	
FERGUSON, A.C. HAYES,	)	
D.K. ENTREKIN, W.M.	)	
MORTLOCK, W.D. JACK-	)	
SON, M.A.C. WADLEY,	)	
and DOE DEFENDANTS	)	
1-50,	)	
	)	
Defendants.	)	

ORDER

Before the Court are the following pending motions: (1) defendants City of Atlanta and individual

City of Atlanta police officers'[1] motion for summary judgment [11]; (2) defendants' motion to strike certain portions of plaintiff Sameth Svay's pleadings [20]; (3) plaintiff's cross-motion for summary judgment against an individual defendant, W.D. Jackson [14]; (4) plaintiff's motion to extend time to file pretrial order [15]; and (5) defendant W.D. Jackson's motion to dismiss plaintiff's motion for summary judgment against him [17].

I. BACKGROUND

The following facts are recited in the light most favorable to the plaintiff, Sameth Svay, according to the standards for reviewing motions for summary judgment. See infra Part IIA. These findings of fact are not binding upon the Court in additional motions. See Cottrell v. Caldwell, 85 F.3d 1480, 1486 (11th Cir. 1996).

On the evening of May 7, 1993, three Atlanta police officers, W.D. Jackson, D.K. Entrekin and M.A.C. Wadley, members of the Zone Three Field Investigative Team ("F.I.T.") drove to the apartment complex at 2959 Forrest Hills Drive in an unmarked vehicle. The officers, who were dressed in plain clothes, rather than in uniforms, parked in the rear parking lot of the

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1. Plaintiff Svay originally named as additional defendants the City of Hapeville, the City of East Point, Fulton County, Colonel Sydney Miles of the Georgia State Patrol and Doe defendants 1-50. There is no material of record evincing that these defendants have been served, and no answers have been filed on behalf of these persons. The only answers and motions have been filed by the City of Atlanta and the individuals, R.L. Ferguson, A.C. Hayes, D.K. Entrekin, W.M. Mortlock, W.D. Jackson, and M.A.C. Wadley. Therefore, the rest of this memorandum pertains only to those persons as named defendants.

apartment complex. This particular complex has a majority of residents of Asian descent, particularly Cambodians.

Jackson, Entrekin, and Wadley were present at the apartment complex to conduct surveillance on Apartment No. 24, where they suspected illegal gambling activity. The officers were gathering information for the impending execution of a search warrant for the apartment.[2] While the officers were parked in the rear parking lot, a woman came out from one of the apartments and noticed the men sitting in the vehicle. Entrekin exited the vehicle to get a closer look at Apartment No. 24 and was on the apartment complex grounds at that time; Wadley and Jackson remained inside the vehicle.

The woman returned to her apartment, and shortly thereafter approximately four men, armed with various firearms, came out of the apartment complex and approached the vehicle; one of those men was the plaintiff Sameth Svay. One of the men, apparently Svay, asked the officers, in broken English, who they were and what were they doing sitting in the vehicle. After the officers indicated that they were police, Svay began walking away. However, another of the men

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2. The officers were at the complex to ascertain how many uniformed officers would be required to execute the search warrant. There is no factual basis for the claim by plaintiff that they were at the area to execute the search warrant themselves and to steal cash from the site.

who was armed with an "AK-47"[3] began shooting at the vehicle. Plaintiff Svay disputes that one of the Asian men began the gunfire exchange; he alleges that the police initiated gunfire and that the startled recognition by Wadley[4] that one of the gentlemen had what appeared to be a machine gun, created panic.

Jackson and Wadley exited the vehicle, with Wadley taking cover prior to the onset of the shooting. Jackson returned fire from behind the car, but Wadley did not fire his weapon. When Entrekin was fired upon by the same man with the "AK-47," he returned fire from his corner. Jackson called the dispatcher for additional officers as reinforcement; Atlanta police officers as well as members of the "Red Dog" squad and the S.W.A.T. team arrived on the scene within several minutes. Two of these additional officers, R.L. Ferguson and A.C. Hayes, arrived on the scene, headed for the area of the shooting. Apparently, when seeing Svay running towards an apartment door, both officers fired in his direction. Svay had been carrying a firearm but had either dropped it or tucked it in his pants and then removed it.[5] Officer Ferguson claims that Svay

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3. Whether this firearm actually was an AK-47 or was another type of firearm, an SK-10, is unclear; however, it also is immaterial.

4. Wadley's report after the incident indicates that it was Jackson who screamed, "[h]e's got an AK!" Def.s' Mot. for Summ. J. Exh. 5.

5. Svay's whereabouts during the shooting and whether he aimed his firearm, a Colt .380. at officers, had the firearm tucked in the front of his pants, or had thrown the weapon to the ground is

pointed the gun at him prior to Ferguson firing at Svay. Svay was hit by a bullet in the leg; it is unknown which officer fired the bullet which hit Svay.[6] Hayes discharged his firearm once; Ferguson discharged his firemen three times. After Svay was hit and fell to the ground, two other officers pulled Svay out of the range of gunfire; Svay was later taken to Grady Hospital in Atlanta for treatment. Svay suffered permanent injury to his leg as a result of the shooting.

Svay was arrested and charged with two counts of aggravated assault and possession of a concealed weapon. After an adversarial preliminary hearing before a City of Atlanta Municipal Court Judge, Svay was bound over for trial in the state court. The district attorney, however, did not present the charges to the Fulton County grand jury for indictment. Svay was not convicted and no charges arising from this incident are pending against him. It is undisputed that Svay did not fire his weapon.

Defendant W.M. Mortlock conducted the shooting investigation. He simultaneously interviewed Wadley, Jackson and Entrekin. Mortlock concluded that no officers engaged in misconduct in the shooting incident. The Atlanta police department's Office of Professional Standards ("OPS") also conducted an investigation and concluded that no wrong had been committed by the Atlanta police officers.

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disputed.

6. The defendants have not acquiesced that an Atlanta police officer fired the shot which injured Svay.

II. DISCUSSION

A. Standard for Summary Judgment

Summary judgment, on one issue or on all issues, will be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.P. 56(c). Where the nonmoving party bears the burden of proof at trial, the moving party must demonstrate to the Court that "there is an absence of evidence to support the non-moving party's case," Celotex v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), or must put forth affirmative evidence negating an element of the nonmoving party's case, Fitzpatrick v. Atlanta, 2 F.3d 1112, 1116 (11th Cir. 1993). It is then the responsibility of the nonmoving party, by revealing evidence outside of the pleadings, that evidence supporting its case does exist or that the element sought to be negated remains a genuine issue of material fact to be tried. Id. Essentially, this requires the nonmoving party to come forward with sufficient evidence to withstand a directed verdict on this issue at trial. Id. at 1116-17.

The non-moving party is not required to carry its burden of proof at the summary judgment stage. In analyzing the case, the Court must view the facts in the light most favorable to the nonmoving party and make all factual inferences in favor of that party. Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 918 (11th Cir. 1993). "The court must avoid weighing conflicting evidence or making credibility determinations." Id. at 919. "Where a reasonable fact finder may 'draw more than one inference from the

facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment.'" Id. (quoting Barfield v. Brighton, 883 F.2d 923, 93334 (11th Cir. 1989)).

On cross-motions for summary judgment, the Court is aware that the "mere filing of cross motions for summary judgment does not warrant the entry of such judgment." Shook v. United States, 713 F.2d 662, 665 (11th Cir. 1983). However, the filing of cross-motions may indicate that no genuine issues of material fact exist. If the facts demonstrate "a basic agreement concerning what legal theories and material facts are dispositive," then summary judgment may be granted. Schlock v. Baker, 580 F.2d 848, 849, 850 (5th Cir. 1978).

B. Individual Defendants' Motion for Summary Judgment[7]

The individual defendants move for summary judgment on all of Svay's claims, including state law tort claims and the federal constitutional claims

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7. The Court notes as an initial matter that both defendants in their motion for summary judgment against Svay and plaintiff Svay in his response and cross-motion for summary judgment exceeded the page limitations set by Local Rule 220-1(d). Motions and responses thereto are not to exceed twenty-five pages without prior permission of the Court. Replies to responses shall not exceed fifteen pages. Neither party requested permission to exceed the page limits. Although the Court excuses the parties' noncompliance at this time, further pleadings and motions shall conform to the Local rules. See LR 220-1(f)(providing the Court discretion not to consider the pleadings at all if they fail to conform with the Local Rules).

asserted pursuant to 42 U.S.C. §§ 1983 and 1985. Defendants have moved to strike certain portions of Svay's response to the motion for summary judgment as well as Svay's cross-motion for summary judgment against Jackson. Svay suggests that Officer Jackson, who has since this incident been indicted and apparently convicted of a crime unrelated to this incident, acted criminally in connection with this situation. Svay's suggestion rests on Jackson's later indictment and apparent conviction. To the extent that Svay relies on that as evidence in this case, the Court GRANTS the motion to strike [20] as the subsequent events have no bearing on the actions in this case.

First and foremost, the individual defendants contend that they are entitled to summary judgment on the basis of qualified immunity. Qualified immunity is an issue of law to be determined by the Court[8], Stone v. Peacock, 968 F.2d 1163, 1165 (11th Cir. 1992), preferably prior to trial, Cottrell v. Caldwell, 85 F.3d 1480, 1487 (11th Cir. 1996). Qualified immunity protects a public official acting in a discretionary capacity from liability if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). The defendant seeking the shield of qualified immunity must

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8. The issue of whether a defendant is entitled to qualified immunity is not to be submitted to a jury. Cottrell v. Caldwell, 85 F.3d 1480, 1488 (11th Cir. 1996). If summary judgment on qualified immunity grounds is denied, then the defendants may raise the defense again at trial. Id. at 1492.

demonstrate first that he was acting within his discretionary authority during the underlying incident. Rich v. Dollar, 841 F.2d 1558, 1563 (11th Cir. 1988). If he does so, then the burden shifts to the plaintiff to show that the defendant's actions violated clearly established law in this circuit. Id. at 1563-64; see also Hansen v. Soldenwagner, 19 F.3d 573, 578 n.6 (llth Cir. 1994) (concluding that the case law of another circuit "cannot settle the law in this circuit to the point of it being 'clearly established'"). "If the facts taken in the light most favorable to the plaintiff do not establish a violation of a clearly established constitutional right, the public official is entitled to summary judgment." L.S.T. Inc. v. Crow, 49 F.3d 679, 683 (11th Cir. 1995).

> Qualified immunity protects all but the blatantly incompetent officer. And for the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that "what he is doing" violates federal law. Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases.

Lassiter v. Alabama A&M Univ., 28 F.3d 1146, 1149-50 (11th Cir. 1994) (en banc)(emphasis added)

(citation omitted). The rights complained of must not be "abstract" but capable of comparison with the circumstances presented in previously decided cases. See id. at 1150; Kelly v. Curtis, 21 F.3d 1544, 1554 (5th Cir. 1994); Post v. Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993), as modified, 14 F.3d 583 (11th Cir. 1994).

As noted above, Svay asserts section 1983 claims against (a) Hayes and Ferguson for the shooting; (b) Jackson, Wadley and Entrekin for creating the situation; and (c) Hayes, Ferguson, Jackson, Wadley, Entrekin, and Mortlock for malicious prosecution and conspiracy to violate Svay's constitutional rights. The Court analyzes these claims separately.

1. Hayes and Ferguson

Svay brings this section 1983 action against Hayes and Ferguson[9] pursuant to the "Fourth Amendment's prohibition against unreasonable seizures of the persons." Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443 (1989). Svay does not contest that Hayes and Ferguson's actions during the incident were discretionary. Therefore, the Court reaches the remainder of qualified immunity analysis: "first, whether the applicable law was clearly established at the time of the governmental action; and

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9. It is undisputed that Hayes and Ferguson shot at Svay during the incident. However, because the bullet passed through Svay's leg, it can never be determined whether either one of the officers or another shooter caused Svay's injuries.

second, whether a genuine issue of material fact must be resolved to determine if the government official's conduct violated clearly established law." Eubanks v. Gerwen, 40 F.3d 1157, 1160 (11th Cir. 1994).

The Eleventh Circuit has admonished district courts to "think long and hard before stripping defendants of immunity." Lassiter, 28 F.3d at 1149. The first step in heeding this warning is to ascertain whether there was established law alerting the police officer that his conduct violated plaintiff's constitutional rights. Although the facts of the instant case need not be exactly the same as the underlying case, previous cases in this circuit or before the United States Supreme Court "must dictate, that is truly compel (not suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." Id. at 1150; see Hansen, 19 F.3d at 578.

"If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." Post, 7 F.3d at 1557. To be clearly established law, there would have to be a case in this circuit or from the Supreme Court stating that a police officer's actions, as in this case, rise to the level of a federal constitutional violation, presumably an unreasonable seizure in violation of the Fourth Amendment.[10] See Lassiter, 28 F.3d at 1150, n.3;

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10. To find a constitutional violation, it must be shown that the force used against Svay was unreasonable. "The 'reasonableness' of a particular use of force must be judged from the

McMillian v. Johnson, 878 F. Supp. 1473, 1528, 1530 (M.D. Ala. 1995) (holding that plaintiff must point out to the Court "a factually analogous case or cases which clearly define the contours of the constitutional right which he claims Defendants offended by their actions," id. at 1528), aff'd in part, vacated in part on other grounds, rev'd in part on other grounds, 88 F.3d 1554 (11th Cir. 1996).

The Court thus must ask whether it was clearly established law in this circuit that a police officer may not discharge his weapon in the direction of a running man who possesses a gun during a shoot-out between a number of armed civilians and police officers. Svay provides the Court with no examples of such case law from this circuit or the Supreme Court stating that the conduct in this case would constitute an unreasonable seizure in violation of the Fourth Amendment. Hayes and Ferguson are entitled to qualified immunity for their actions, and, hence, summary judgment shall be entered in their favor.

2. *Entrekin, Jackson and Wadley*

Plaintiff contends that Entrekin, Jackson and Wadley should be held liable for his injuries because they

> recklessly created dangerous circumstances by setting up their

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perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989).

> surveillance in the parking lot [and] Jackson Wadley recklessly escalated to the use of deadly force by opening fire on the Asian gentlemen, then Jackson gave an indiscriminating radio broadcast . . . wherein Jackson described Svay as a dangerous perpetrator, when he knew that Svay was innocent, thereby encouraging officers on the scene . . . to misread Svay's intent and to shoot Svay before giving him an opportunity to extricate himself from the crisis created by Jackson, Entrekin and Wadley.

Pl.'s Br. in Opp. to Def.s' Mot. for Summ. J. at 12-13. Svay cites only one case in support of his claims against these three of officers, and it is from the First Circuit Court of Appeals. As noted above, it is the law of this circuit which controls, and Svay has failed to satisfy his burden of showing that these men violated the clearly established law of this circuit in taking the actions they did on May 7, 1993. Accordingly, each is entitled to summary judgment on these claims.

3. Hayes, Ferguson, Jackson, Wadley, Entrekin and Mortlock

Svay charges that Hayes, Ferguson, Jackson, Bradley, Entrekin and Mortlock (the "Officers') conspired to deprive him of his constitutional equal

protection rights in violation of section 1985(3).[11] The qualified immunity defense is not available to the Officers on this claim. Burrell v. Board of Trustees of Georgia Military College, 970 F.2d 785, 794 (11th Cir. 1992), cert. denied, 507 U.S. 1018, 113 S. Ct. 1814, 123 L. Ed. 2d 445 (1993). However, the Officers are not subject to liability

> unless their actions were motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." This narrow intent requirement erects a significant hurdle for section 1985(3) plaintiffs. Section 1985(3) actions often stand or fall on the plaintiff's ability to establish the specific type of discriminatory animus behind the conspirators' actions. Public officials thereby enjoy an additional protection against section 1985(3) actions not available to them in section 1983 actions.

Id. (citations omitted).

Plaintiff needs to show both evidence of a conspiracy and evidence of racial or other class-based animus. Failure to show evidence of a discriminatory

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11. Although it is not completely clear from the materials before the Court, the Court reads plaintiffs complaint to state a conspiracy action under section 1985(3) on the basis of the plaintiffs complaint and the joint preliminary statement and scheduling order submitted to the Court. Plaintiff relies upon racial animus provoking the conspiracy.

motive is fatal to the plaintiffs claim. In this action, Svay has not shown any evidence of discriminatory animus, neither direct nor circumstantial; he simply alleges the existence of discriminatory animus on the basis that he is of Asian descent and the Officers are not. Svay has raised no other evidence in his response to defendants' motion, and thus, there is no genuine issue of material fact to prevent summary judgment on this issue.[12]

Lastly, plaintiff raises claims of false arrest and malicious prosecution against the Officers. The Officers again defend on the basis of qualified immunity.

Arresting a suspect clearly is a discretionary function. Herrerl v. Bowyer, 850 F.2d 1543, 1546 n.5 (11th Cir. 1988) (arrest without a warrant is a discretionary function); Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980) (a jailor's discretion in imprisoning an

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12. Given the Court's conclusion that there is no evidence of racial or class-based discriminatory animus, the Court need not examine whether there is direct or circumstantial evidence of a conspiracy. The Court acknowledges that circumstantial evidence may be used to prove a conspiracy under section 1985(3); however, looking at all the evidence offered by the plaintiff in the light most favorable to the plaintiff, the Court does not find the slightest evidence of a conspiracy between the Officers. See Burrell, 970 F.2d at 793. Moreover, it does not appear that Svay claims a section 1983 conspiracy involving "private parties who conspire with" a public official so as to state a "section 1983 conspiracy." Dykes v. Hoseman, 743 F.2d 1488, 1494 (11th Cir. 1984), vacated on other grounds, 776 F.2d 942 (11th Cir. 1985) (en banc), reinstated, 783 F.2d 1000 (llth Cir. 1986) (per curiam), cert. denied, 479 U.S. 983, 107 S. Ct. 569, 93 L. Ed.2d 574 (1986).

individual is more limited than a police officer's discretion in effectuating an arrest). Therefore, the burden shifts to the plaintiff to show that no "reasonable officer in the same circumstances and possessing the same knowledge as the officer[s] in question could have reasonably believed that probable cause existed in the light of well-established law." Eubanks v. Gerwen, 40 F.3d 1157, 1160 (11th Cir. 1994) (emphasis added). This is a standard of "arguable probable cause" rather than "probable cause in fact." Id.; Pickens v. Hollowell, 59 F.3d 1203, 1206 (11th Cir. 1995).

There was a shooting between a number of armed civilians and police officers during dark hours. Plaintiff carried a gun and had approached the police vehicle with other men suspected of operating a gambling establishment. Despite plaintiffs protestations to the contrary, such facts are sufficient to raise arguable probable cause and entitle the Officers to qualified immunity for the false arrest claim.

With respect to plaintiffs malicious prosecution claim, the Eleventh Circuit has held that "any of the pretestimonial acts that might have undermined the federally guaranteed right to be free of malicious prosecution [under the Fourth Amendment through the Fourteenth Amendment] can form the basis of a [section] 1983 action." Strength v. Hubert, 854 F.2d 421, 426 (11th Cir. 1988) (per curium). And, defendants may raise qualified immunity as a defense to this claim. Id. Reviewing plaintiff's response to defendants' motion for summary judgment as to this issue indicates that Svay really only seeks to hold

Jackson responsible for malicious prosecution.[13] Even if Svay were trying to hold the remaining plaintiffs liable for malicious prosecution, there is no evidence to support such a claim against them.[14] Therefore, as to all the defendants but Jackson, the Court decides, on the merits of the claim rather than on the issue of qualified immunity, that the Officers (but not Jackson) are entitled to summary judgment on the malicious prosecution claim.[15] See Eubanks v. Gerwen, 40 F.3d 1157, 1161 (llth Cir. 1994) (holding that defendants not subject to malicious prosecution liability where the decision to prosecute is made by others and they have not acted improperly to influence the decision to prosecute).

Svay has moved for partial summary judgment against Jackson on this issue [14-2]. Officer Jackson moved to strike the motion for partial summary

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13. The question of whether a malicious prosecution claim necessarily asserts a Fourth Amendment constitutional violation remains undecided. Whiting v. Travlor, 85 F.3d 581, 584 n.4 (11th Cir. 1996).

14. Plaintiff's statements of disputed facts indicate only items related to Jackson and not the other officers. See Pl.'s Stmt. of Disputed Facts at ¶ 48, p. 43.

15. The Court does not reach the issue of whether the case against Svay was terminated in his favor. Whiting, 85 F.3d at 585 & n. 10 (noting that common law malicious prosecution claims require that termination of the criminal proceedings be had in plaintiff's favor but noting that deciding whether that has occurred is not easy to do).

judgment because the motion is untimely [17].[16] Svay did not request leave of Court to file a motion for summary judgment out-of-time. Therefore, the Court GRANTS the motion to strike plaintiffs for summary judgment [17].

This leaves the Court to address the question of Jackson's liability to Svay for statements made during a preliminary hearing to Judge Andrew A. Mickle of the City of Atlanta Municipal Court. The Judge bound the case over to state court after the hearing, and Svay contends that resulted from Jackson's lies and misstatements on the stand. Although not raised by Jackson, Jackson may be entitled to absolute immunity for his statements on the witness stand, as noted by plaintiff in his response to defendant's motion for summary judgment and cross-motion for summary judgment against Jackson. The Eleventh Circuit extended the principle of absolute witness immunity for testimony made at trial to the grand jury phase in Strength v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988).[17] The preliminary hearing engaged here was certainly part of the "judicial phase" of the criminal

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16. Defendant entitles the motion, a motion to dismiss. In actuality, it is a motion to strike the cross-motion for summary judgment as untimely.

17. Plaintiff notes that this Eleventh Circuit precedent is out of sync with other circuits around the country. And, while that may be, this Court is bound by the precedent of the Eleventh Circuit. Until the Eleventh Circuit, via an en banc panel, or the United States Supreme Court overrules the opinion, this Court is bound thereby. Nevertheless, Strength does not dictate the result in this case, but merely presents persuasive authority.

proceeding. Not only was the judge present, but counsel had an opportunity to call, examine, and cross-examine witnesses. The preliminary hearing was a part of the "judicial phase" of the criminal process and as such, Officer Jackson is absolutely immune from civil damages for his testimony during that hearing. Curtis v. Bembenek, 48 F.3d 281, 285 (7th Cir. 1995); Hunt v. Bennett, 17 F.3d 1263, 1267-68 (10th Cir.), cert. denied, __U.S.__, 115 S. Ct. 107, 130 L. Ed. 2d 55 (1994); Holt v. Castaneda, 832 F.2d 123, 127 (9th Cir. 1987), cert. denied, 485 U.S. 979, 108 S. Ct. 1275, 99 L. Ed. 2d 486 (1988). Hence, Jackson is entitled to summary judgment on the claim of malicious prosecution. This concludes the discussion of Svay's claims against the individual police officers. Svay asserts additional claims against the City of Atlanta.

C. City of Atlanta's motion for Summary Judgment

Svay asserts that the City of Atlanta (the "City") is liable under section 1983 for (1) the collective deliberate indifference of its officers on the scene of the shoot-out; (2) for its deficient internal investigation; (3) for its toleration of a code of silence among the police officers; (3) and for a custom, policy and practice of inadequate training, supervision, discipline and toleration of excessive force and officer dishonesty. The City cannot raise the defense of qualified immunity, but is only liable under section 1983 if the City promotes an official policy or custom according to which the Officers acted and that caused

the plaintiff a constitutional deprivation. Monell, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978). "The `official policy' requirement was intended to distinguish acts of the municipality from the acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." Morgan v. Tice, 862 F.2d 1495, 1499 (11th Cir.), cert. denied, 493 U.S. 813, 110 S. Ct. 61, 107 L. Ed. 2d 28 (1989).

To avoid summary judgment the plaintiff must reveal or point out to the Court concrete or specific facts which, if at trial, would prevent the entry of a directed verdict against him. Although Svay's counsel argues that the jury could infer that the City had a custom, policy or practice relating to any of the above four claims, he has identified to the Court only one bit of evidence in support thereof, that is that the City of Atlanta police department does not allow the tape recording of witness's statements to officers while conducting an internal investigation. That fact alone does not support the four charges Svay makes against the City. The plaintiff must put forth proof tending to bolster its claims. There is nothing in this record which a jury could reasonably rely upon to render a verdict in plaintiffs favor against the City. Accordingly, the Court GRANTS summary judgment in favor of the City. Cf. Bailey v. Board of County Comm'rs of Alachua County, 956 F.2d 1112, 1125 (11th Cir.) (dismissing section 1983 claims against county because the record was "devoid of evidence" that the county had "any official policy or custom" to

deny the plaintiffs constitutional rights), cert. denied, __U. S.__, 113 S. Ct. 98, 121 L. Ed. 2d 58, and cert. denied, __U.S.__ , 113 S. Ct. 98, 121 L. Ed. 2d 58 (1992).

III. CONCLUSION

For the reasons above, the Court GRANTS defendants' motion for summary judgment in full [11]. The Court GRANTS defendants' motion to strike certain portions of Svay's pleadings [20], and the Court GRANTS defendant Jackson's motion to strike Svay's cross-motion for summary judgment against him as untimely [17]. Svay's motion for partial summary judgment against Jackson thus is DENIED [14]. Svay's motion to extend time for filing consolidated pretrial order is DENIED as MOOT [15].

The Clerk is DIRECTED to enter judgment in favor of the City of Atlanta, and individual defendants R.L. Ferguson, A.C. Hayes, D.K. Entrekin, W.M. Mortlock, W.D. Jackson, and M.A.C. Wadley. Svay is DIRECTED to show cause within thirty (30) days, pursuant to Federal Rule of Civil Procedure 4(m), why the action against the remaining named defendants should not be dismissed.

It is so ORDERED THIS 20 day of September, 1996.

Original signed by:
Willis B. Hunt, Jr.
Judge, United States District Court

APPENDIX B -- OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, IN THE MATTER OF *Lieu Uy v. City of Atlanta*, Case No. 1:95-CV-1428-WBH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LIEU UY,	)	
	)	
Plaintiff,	)	CIVIL ACTION FILE
	)	
v.	)	No. 1:95-CV-1174-WBH
	)	
CITY OF ATLANTA,	)	
and DOE DEFENDANTS,	)	
1-50,	)	
	)	
Defendants.	)	

ORDER

This case is a Title 42, United States Code, section 1983 action against the City of Atlanta and Doe defendants for injuries Plaintiff Lieu Uy[1] received

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1. Plaintiff's name appears in the record both as "Lieu Uy" and "Uy Lieu." Because the case was filed as "Lieu Uy" the Court observes the practice of using the latter name as the reference

during an incident between police and residents of Uy's apartment complex. The pending motions now before the Court are (1) defendants' motion to dismiss Doe defendants 1-50 [12]; (2) defendants' motion for summary judgment [10]; and (3) defendants' motion to strike plaintiff's brief in opposition to the motion for summary judgment [17].

I. BACKGROUND

The following facts are recited in the light most favorable to the plaintiff Lieu Uy, according to the standards for reviewing motions for summary judgment. See infra Part IIA. These findings of fact are not binding upon the Court in additional motions. See Cottrell v. Caldwell, 85 85 1480, 1486 (11th 1996).

On the evening of May 7, 1993, three Atlanta police officers, W.D. Jackson, D.K. Entrekin, and M.A.C. Wadley, members of the Zone Three Field Investigative Team ("F.I.T.") drove to the apartment complex at 2959 Forrest Hills Drive in an unmarked vehicle. The officers, who were dressed in plain clothes, rather than in uniforms, parked in the rear parking lot of the apartment complex. This particular complex has a majority of residents of Asian descent. Plaintiff Uy is "Chinese Vietnamese." Def.'s Stmt. of Undisputed Facts at ¶ 7.

Jackson, Entrekin, and Wadley were present at the apartment complex to conduct surveillance on Apartment No. 24, where they suspected illegal

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name herein.

gambling activity. The officers were gathering information for the impending execution of a search warrant for the apartment. While the officers were parked in the rear parking lot, a woman came out from one of the apartments and noticed the men sitting in the vehicle. Entrekin exited the vehicle to get a closer look at Apartment No. 24 and was on the apartment complex grounds at that time; Wadley and Jackson remained inside the vehicle.

The woman returned to her apartment, and shortly thereafter approximately four men, armed with various firearms, came out of the apartment complex and approached the car. One of the men asked the officers, in broken English, who they were and what were they doing sitting in the vehicle. After the officers indicated that they were police, one of the men began walking away. However, another of the men who was armed with an "AK-47"[2] began shooting at the vehicle. It is disputed that one of the Asian men began the gunfire exchange; it is alleged that the police initiated gunfire and that the startled recognition by Wadley[3] that one of the gentlemen had what appeared to be a machine gun, created panic.

Jackson and Wadley exited the vehicle, with

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2. Whether this firearm actually was an AK-47 or was another type of firearm, an SK-10, is unclear; however, it also is immaterial.

3. Wadley's report after the incident indicates that it was Jackson who screamed, "[h]e's got an AK!" Def.s' Mot. for Summ.J. Exh. 5. For the claims presented in this case, it is immaterial who started the shooting.

Wadley taking cover prior to the onset of the shooting. Jackson returned fire from behind the car, but Wadley did not fire his weapon. When Entrekin was fired upon by the same man with the "AK-47," he returned fire from his comer. Jackson called the dispatcher for additional officers as reinforcement; Atlanta police officers as well as members of the "Red Dog" squad and the S.W.A.T. team arrived on the scene within several minutes.

Plaintiff Lieu Uy, returning from work and a trip to the market, was in his car when the shooting occurred. At first he was told to remain in his car due to the shooting. Later, he was pulled from the car by police officers armed with rifles and treated violently, apparently hit with nightsticks by Atlanta S.W.A.T. team officers. Uy was handcuffed and left prostrate on the ground. After Uy's handcuffs were removed by another officer, Uy reported the incident to Lieutenant F.R. Ackley. Ackley ordered a police photographer at the scene to photograph Uy's injuries. At Uy's request, he was taken by ambulance to South Fulton County Hospital where he was treated for contusions and a strained neck, and then released. Uy was never arrested or charged in the shooting incident. Uy is uncertain exactly which S.W.A.T. members caused his injuries, but there is no dispute that Uy was injured during the incident. Uy filed a complaint with the Atlanta police departments' Office of Professional Standards ("OPS"), which investigates citizen complaints against police officers. Uy's complaint was investigated by Investigator M.E. Wilson and Investigator M.D. Lewis. However, the complaint was mistyped and the date

was written as March 7, 1993, rather than May 7, 1993.[4] This caused confusion in the investigation of the complaint and a delay in the OPS's reaching an ultimate finding in the case. The result of the complaint was a finding of "not sustained," meaning that there was neither enough evidence to find that officers acted improperly nor enough evidence to exonerate the officers. Uy's complaint was "exceptionally closed."

II. DISCUSSION

A. Standard for Summary Judgment

Summary judgment, on one issue or on all issues, will be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Where the nonmoving party bears the burden of proof at trial, the moving party must demonstrate to the Court that there is an absence of evidence to support the nonmoving party's case," Celotex v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), or must put forth affirmative evidence negating an element of the nonmoving party's case, Fitzpatrick v. Atlanta, 2 F.3d 1112, 1116 (11th Cir. 1993). It is then the responsibility of the nonmoving party, by revealing evidence outside of the pleadings, that evidence supporting its case does exist or that the element sought to be negated remains a genuine issue

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4. Although Uy signed the complaint, it is understood that Uy speaks very little English and may not have realized an error had been made.

of material fact to be tried. Id. Essentially, this requires the nonmoving party to come forward with sufficient evidence to withstand a directed verdict on this issue at trial. Id. at 1116-17.

The nonmoving party is not required to carry its burden of proof at the summary judgment stage. In analyzing the case, the Court must view the facts in the light most favorable to the nonmoving party and make all factual inferences in favor of that party. Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 918 (11th Cir. 1993). "The court must avoid weighing conflicting evidence or making credibility determinations." Id. at 919. "Where a reasonable fact finder may `draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment.'" Id. (quoting Barfield v. Brierton, 883 F.2d 923, 933-34 (11th Cir. 1989)).

B. City of Atlanta's Motion to Dismiss Doe Defendants 1-50

Defendant City of Atlanta (the "City") moves to dismiss Doe defendants 1-50 [12] because they are neither identifiable nor amenable to being served, and because the failure to serve the Doe defendants violates Federal Rule of Civil Procedure 4(j). Plaintiff has not filed any opposition motion. In Dean v. Barber, 951 F.2d 1210, 1215-16 (11th Cir. 1992), the Eleventh Circuit held that if a defendant has been named with "sufficient clarity" and an adequate description has been included in the complaint so that the fictitiously

named defendant may be served, then the action may proceed without requiring that the fictitiously named defendant's correct name be used. Id. at 1216 (citing Keno v. Doe, 74 F.R.D. 587, 588 n.2. (D.N.J. 1977)).

Discovery in this case is complete and no motion by Uy has been made to join any new defendants or to name with specificity any of the Doe defendants, despite the fact that there is evidence tending to show certain officers were involved. Under the standard developed by Dean v. Barber, and Local Rule 220-1, this Court GRANTS defendant's motion to dismiss the Doe defendants [12]. By dismissing the Doe defendants, the remaining claims are section 1983 claims against the City only. While the City has admitted that its officers were involved in the beating, no individual officers have been named by Uy as defendants in this case.[5]

C. City of Atlanta's Motion for Summary Judgment against Uy

The City is liable under section 1983 only if the City promotes an official policy or custom according to which the Officers acted and that caused the plaintiff a constitutional deprivation. Monell v. Department of Soc. Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978). "The `official policy' requirement was intended to distinguish acts of the

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5. A plaintiff may bring a case against the City without bringing a case against the individual defendants. Anderson v. Atlanta, 778 F.2d 678, 686 (11th Cir. 1985). Therefore, the dismissal of the Doe defendants does not impact Uy's remaining claims.

municipality from the acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." Morgan v. Tice, 862 F.2d 1495, 1499 (11th Cir.), cert. denied, 493 U.S. 813, 110 S. Ct. 61, 107 L. Ed. 2d 28 (1989). This means that the City is not responsible for injuries sustained merely because one of its employees was a tortfeasor. Monell, 436 U.S. at 692, 98 S. Ct. at 2036. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. at 694, 98 S. Ct. at 2037-38.

Generally it is true that a city may not be liable to an injured party based "on a single act of negligence or misconduct" on the part of a city employee. Anderson v. Atlanta, 778 F.2d 678, 685 (11th Cir. 1985). Therefore, the City will be entitled to summary judgment unless Uy can assert some reasonable basis for a jury to find that the City maintained a pattern or practice which resulted in Uy's injury. And, for plaintiff to be able to do so, he must prove that there was (1) a municipal policy or practice which (2) caused a constitutional violation. Id. at 687. To carry this burden, plaintiff must show an "affirmative link between the various incidents of policy misconduct and the adoption of any plan or policy by the municipality or the supervisory official showing their authorization or approval of such misconduct." Id.

The Court begins with the inquiry of whether

Uy suffered a deprivation of constitutional rights. If there has been no unconstitutional deprivation, then there is no need to inquire whether the City maintains a policy, practice or custom which could lead to a deprivation. Uy has the burden of proof of showing that he was deprived of a constitutional right. That proof is based on two inquiries. First is "whether the officers' actions [were] `objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (1989). Second is whether the injuries received as a result of the conduct were "so egregious as to exceed the boundaries of wrongful injuries redressable under tort law." Byrd v. Clark, 1002, 1006 (11th Cir. 1986). The City claims that Uy's injuries were minor and did not rise to the level of a constitutional tort and that exigent circumstances existed justifying the officers' acts in seizing Uy. Uy has presented sufficient evidence to raise a question for the jury regarding whether a constitutional violation occurred; there are genuine issues of material fact on these points.[6] Cf. Byrd, 783 F.2d at 1007 ("Whether the force was constitutionally excessive under these facts, is for the jury to determine.")

Assuming that Uy suffered a constitutional

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6. It is undisputed that a tense situation existed with gunfire in the parking lot but it is also undisputed that Uy was sitting in his car when he was pulled from the car, treated violently and handcuffed.

injury, the Court must still decide whether there is evidence, sufficient to withstand summary judgment, that the City maintained a policy, practice or custom which caused the deprivation of Uy's constitutional rights. Uy alleges that (1) the City's custom or practice was to inadequately, hire, train, supervise, retrain and/or discipline its officers regarding unlawful seizures resulting from the City's deliberate indifference to citizens' rights; (2) the City maintained a custom or practice of tolerating excessive force by the police department officers; and (3) the City maintained a practice of tolerating a "code of silence" among its officers preventing disclosure of the officers responsible for the attack.

The City seeks to strike plaintiffs response to the motion for summary judgment to the extent that it (1) relies on conduct of an officer who was later indicted and apparently convicted of an unrelated crime and (2) relies on conduct much later than the incident in question and much earlier than the incident in question. To the extent that plaintiff attempts to rely on the indictment and apparent conviction of an officer for an unrelated incident in its pleadings, the Court STRIKES those portions of the brief. As to the evidence supplied which predates and postdates the incident, the Court considers the motion as objections to the evidence on relevance grounds.

> [A] motion to strike is only appropriately addressed toward matters contained in the pleadings, Fed. R. Civ. P. 12(f), and affidavits submitted in support of a

> motion are clearly not within that category. See Fed. R. Civ. P. 7. Regardless of the practice followed in other forums, this court does not sanction the use of a rule 12(f) motion for the advancement of objections to an affidavit filed in support of a motion.... It is sufficient for the party opposing the motion to register its objection to the movant's affidavits by way of the material submitted in opposition to the motion. The court will then implicitly, if not explicitly, rule upon these objections in its consideration of the motion.

Smith v. Southeastern Stages, Inc., 479 F. Supp. 593, 594-95 (N.D. Ga. 1977); see Morgan v. Sears, Roebuck & Co., 700 F. Supp. 1574, 1576 (N.D. Ga. 1988) (reading motion to strike as objection to evidence); Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 595 F. Supp. 1442, 1443 (N.D. Ga. 1984) (same), rev'd on other grounds, 788 F.2d 1500 (11th Cir. 1986).

Also, although perhaps unknown to the defendant, the declaration of Lou Reiter, plaintiff's expert witness, which was filed with the plaintiff's response to the motion for summary judgment and to which defendant objects, is unsigned and unacknowledged and thus is not considered in reaching the Court's conclusions on the pending summary judgment motion Therefore, the Court GRANTS IN PART and DENIES IN PART the motion to strike

[17].

Plaintiff's opposition to the defendant's motion for summary judgment is not in the form of a brief as is commonly filed in this Court. Instead, it consists of a statement of genuine issues of material fact with intermittent citations to case law. The Court has reviewed this "brief" completely, and although what happened to Uy is distressing, plaintiff has provided the Court with no basis upon which the Court could find that plaintiff has carried its burden to withstand summary judgment. The plaintiff points to no specific facts tending to show that the City maintained a policy, practice or custom which caused Uy's injuries. Accordingly, the Court GRANTS summary judgment in favor of the City.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS defendant's motion to dismiss Doe defendants 1-50 [12], GRANTS IN PART and DENIES IN PART defendant's motion to strike plaintiff's response to summary judgment and affidavit in support [17], and GRANTS defendant's motion for summary judgment [10]. This disposes of all of the pending motions in this case. The Clerk is DIRECTED to enter judgment in favor of the defendants and to close this case.

It is so ORDERED this 20 day of September, 1996.

Original signed by:
Willis B. Hunt, Jr.
Judge, United States District Court

APPENDIX C -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 7, 1997, APPEAL NOS. 96-9226 AND 96-9227

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 96-9226

D. C. Docket No. 1:95-CV-1174-WBH

SAMETH SVAY,

Plaintiff-Appellant,

versus

CITY OF ATLANTA, R.L. FERGUSON, A.C. HAYES, D.K. ENTREKIN, W.M. MORLOCK, W.D. JACKSON, M.A.C. WADLEY, Atlanta Police Officers, in their individual and official capacities and Does 1 thru 50 inclusive,

Defendants-Appellees,

CITY OF HAPEVILLE, CITY OF EASTPOINT, FULTON COUNTY, SYDNEY MILES, Colonel, Georgia State Patrol, sued in his individual capacity,

Defendants.

No. 96-9227

D. C. Docket No. 1:95-CV-1428-WBH

LIEU UY,

Plaintiff-Appellant,

versus

CITY OF ATLANTA, Does
1 thru 50 inclusive,

Defendant-Appellee,

Appeals from the United States District Court
for the Northern District of Georgia

(August 7, 1997)

Before EDMONDSON and DUBINA, Circuit Judges, LIMBAUGH*, Senior District Judge.

PER CURIAM:

AFFIRMED. See Eleventh Circuit Rule 36-1.

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* Honorable Stephen N. Limbaugh, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

No. 97-1220

Supreme Court, U.S.
FILED
FEB 25 1998

In The

Supreme Court of the United States

October Term, 1997

SAMETH SVAY,

Petitioner,

vs.

CITY OF ATLANTA, *et al.*,

Respondents.

LIEU UY,

Petitioner,

vs.

CITY OF ATLANTA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Supreme Court review is required to clear up confusion among the various circuits regarding the parameters of a Fourth Amendment malicious prosecution claim under 42 U.S.C. § 1983?

Respondents believe the more focused question is whether testimony provided by a police officer at an adversarial preliminary hearing is protected by absolute immunity.

2. Whether Supreme Court review is required to resolve the issue of whether the intentional or reckless conduct of one police officer is actionable under 42 U.S.C. § 1983 when it causes another officer to use excessive force?

3. Whether an argument that a Code of Silence exists within a police department can be sufficient to support a claim of municipal liability under 42 U.S.C. § 1983?

LIST OF PARTIES

The parties are Petitioner Sameth Svay, Petitioner Lieu Uy, Respondent City of Atlanta in both actions, and Respondents R. L. Ferguson, A. C. Hayes, D. K. Entrekin, W. M. Morlock, W. D. Jackson and M. A. C. Wadley in their individual and official capacities in the case brought by Sameth Svay.

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OPINIONS BELOW

In the case of *Sameth Svay v. City of Atlanta, et al.*, Court of Appeals for the Eleventh Circuit, No. 96-9226, and in the case of *Lieu Uy v. City of Atlanta,* Court of Appeal for the Eleventh Circuit, No. 96-9227, the judgment of the panel for the Eleventh Circuit was per curiam affirmed.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a). Judgment of the Court of Appeals for the Eleventh Circuit was entered August 7, 1997.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

While petitioners Sameth Svay and Lieu Uy have pursued the appellate process together, their cases are factually and procedurally distinct even though they arise from the same incident. Respondents prefer to list those facts common to both petitioners, and then address each case separately.

A. Statement of Common Facts

Petitioners set forth fifteen (15) pages of facts. Most of that factual recitation is irrelevant. What follows are the facts relied

upon by the United States District Court for the Northern District of Georgia, and the Court of Appeals for the Eleventh Circuit.

On the evening of May 7, 1993, three plainclothes Atlanta Police Officers — Jackson, Entrekin and Wadley — drove into the parking lot of a predominately Asian apartment complex. The three officers were there ostensibly to serve a search warrant on a suspected Vietnamese gambling game which the officers suspected was run from an apartment in the complex.

While the officers were surveilling the complex, Sameth Svay, along with three other men, armed themselves and walked toward the unmarked police car where officers Jackson and Wadley were located. Officer Entrekin had moved away from the car in order to get a better view of the suspect apartment. The two groups of men confronted each other. It is unclear what communication passed between them, if any. Officer Jackson yelled that one of the men had an AK-47. Gunfire immediately erupted. The district court noted that the facts are in dispute as to who shot first. The court also noted that such a determination is unnecessary and irrelevant.

While shots were being fired, the officers called for help and back-up and described the men involved in the initial confrontation and subsequent on-set of gunfire. Many police officers and sheriff's deputies from many jurisdictions responded to the call for help, among them the Atlanta Police Department Strategic Weapons and Tactical team, (SWAT), and Atlanta Police Officers Ferguson and Hayes.

SAMETH SVAY

A. Statement of Facts

Officers Ferguson and Hayes saw Sameth Svay running across a courtyard between two buildings of the apartment complex. Mr. Svay fit the description of one of the group of men who had fired on officers Jackson and Wadley. Mr. Svay was armed with a

9 mm. handgun. He was challenged by the officers and shot in the left leg as he was attempting to enter an apartment. Officers Ferguson and Hayes did not know who lived in the apartment.

Sameth Svay was arrested and charged with aggravated assault and carrying a concealed weapon. Officer Jackson gave testimony at Mr. Svay's preliminary hearing. After the hearing, Mr. Svay's criminal case was bound over for prosecution. The criminal case against Mr. Svay ultimately was dismissed.

B. Proceedings Below

The district court granted summary judgment in favor of the respondents on all of the petitioner's claims. The court granted summary judgment in favor of the City of Atlanta because the record was devoid of evidence necessary to support a claim of municipal liability under 42 U.S.C. § 1983. The court granted summary judgment in favor of officers Entrekin and Wadley on petitioner's malicious prosecution claim because the petitioner had produced no evidence that would support his claim that they had engaged in the prosecution of his criminal case.

The court granted summary judgment in favor of Officer Jackson on petitioner's malicious prosecution claim because petitioner's claim was premised solely on Officer Jackson's testimony at a preliminary hearing, and because Officer Jackson was entitled to absolute immunity from liability arising from that testimony.

Finally, the court granted summary judgment in favor of officers Entrekin, Jackson and Wadly on petitioner's claim that they intentionally had created a situation in which Sameth Svay would be shot. Petitioner failed to produce any precedent in the Eleventh Circuit that would support a claim of liability where police officers who did not shoot a criminal suspect should be held liable because they created the situation that caused the suspect to be shot. The lack of any Eleventh Circuit precedent led the court to rule that officers Entrekin, Jackson and Wadley were entitled to qualified immunity as to this claim.

The Eleventh Circuit Court of Appeals affirmed the ruling of the district court without comment.

LIEU UY

A. Statement of Facts

After the initial exchange of gunfire between the group of Asian men and officers Jackson and Wadley, a brief lull ensued. During this lull, Lieu Uy pulled into the parking lot of the apartment complex after a day of work as a cook in a Chinese restaurant. An unknown police officer ordered him to stay in his car. He did. When other police officers responded to the scene, Atlanta Police Strategic Weapons and Tactical (SWAT) officers were with them. Unidentified police officers, (apparently SWAT), pulled Lieu Uy from his car and beat him. Mr. Lieu Uy never identified anyone as having beat him.

B. Proceedings Below

Petitioner Lieu Uy listed as defendants John Does 1 - 50. He never identified any of the John Does, nor did he effect service of process upon them. The district court granted summary judgment in favor of the respondent John Does because they had never been identified, nor served. The court granted summary judgment in favor of the City of Atlanta, who was the only remaining defendant, because the petitioner had not shown the existence of a policy, custom or practice of the City of Atlanta Police Department about which the City should have known caused violations of citizens rights and in particular caused a violation of petitioner's rights.

The Court of Appeals for the Eleventh Circuit affirmed without comment.

REASONS FOR DENYING THE WRIT AS TO SAMETH SVAY

I.

PETITIONERS' MALICIOUS PROSECUTION ARGUMENT ACTUALLY CONTESTS THE GRANTING OF ABSOLUTE IMMUNITY FOR TESTIMONY GIVEN AT JUDICIAL PROCEEDINGS; HOWEVER THE SETTLED LAW APPLICABLE TO THIS CASE IS CLEAR THAT THE RESPONDENT POLICE OFFICERS ARE ENTITLED TO ABSOLUTE IMMUNITY.

Petitioner Svay argues that the case of *Albright v. Oliver,* 114 S. Ct. 807 (1994) has led to confusion among the various circuits as to the scope of a cause of action for malicious prosecution under the Fourth Amendment. The thrust of petitioner's argument actually focuses on apparent confusion among the various circuits as to the scope of immunity granted police officers for their testimony given at judicial proceedings. *See Briscoe v. La Hue,* 460 U.S. 325 (1983).

The district court granted summary judgment to the respondents against petitioner's claim of malicious prosecution on the ground that police officers who testify in judicial proceedings are entitled to absolute immunity. The district court based its ruling in part on the authority of *Strength v. Hubert,* 854 F.2d 421 (11th Cir. 1988) which stands for the proposition that police officers are entitled to absolute immunity when they testify at judicial proceedings regardless of the nature of those proceedings.

There exists among the circuits a difference of opinion as to whether the grant of absolute immunity should be limited to testimony given at judicial proceedings that are adversarial in nature, or be allowed to encompass all proceedings that can be classified as judicial.

One of the more recent surveys of how the various circuits treat the extension of absolute immunity to police officers was

provided in *Curtis v. Bembenek*, 48 F.3d 281, 284 (7th Cir. 1995). The results of its survey lead that court to conclude that a

> majority of the circuits have afforded absolute immunity to witnesses, including police officers charged under § 1983 for their allegedly perjurious testimony at various types of pretrial proceedings.

Bembenek, 48 F.3d at 284.

An easy majority of courts extend immunity to witness testimony provided at preliminary hearings. A few circuits have expressed concern over extending immunity to proceedings that are without judicial restraint or cross examination.

The district court in the case *sub judice* found as part of the factual record that during the preliminary hearing, where Officer Jackson is claimed to have provided perjurious testimony, the petitioner had the opportunity to obtain counsel, cross-examine Officer Jackson and present witnesses on his behalf. In other words, the petitioner had the benefit of the same procedural safeguards that he would have enjoyed at trial. When considering the extension of absolute immunity to pretrial proceedings, the Seventh Circuit could find

> no principled basis for distinguishing between the [adversarial] pretrial proceedings and the trial on the merits in determining whether absolute immunity should be granted to a police officer witness.

Curtis v. Bembenek, 48 F.3d at 285; *citing Moore v. McDonald*, 30 F.3d 616, 619 (5th Cir. 1994).

The petition for writ of certiorari should be denied as to this issue because the various circuits are in agreement that where a criminal defendant has the opportunity to obtain counsel, cross-examine police officers giving testimony and call witnesses on his

behalf, the officers giving testimony are entitled to absolute immunity. While there exists a difference among the circuits as to the scope of absolute immunity. That difference is not highlighted by the facts of this case.

II.

POLICE OFFICERS, WHOSE INTENTIONAL OR RECKLESS BEHAVIOR CREATES A SITUATION THAT RESULTS IN OTHER OFFICERS SHOOTING SOMEONE, SHOULD NOT BE EXPOSED TO LIABILITY BECAUSE THE CONSEQUENCE OF THEIR ACTS IS TOO REMOTE AND NOT FORESEEABLE.

The petitioner argues officers Entrekin, Jackson and Wadley should be liable for the fact that he was shot in the leg even though officers Ferguson and Hayes were the officers that fired at him and even though petitioner no longer contends that the actions of Ferguson and Hayes were an excessive use of force. The petitioner claims that the intentional acts of Entrekin, Jackson and Wadley caused the otherwise justifiable shooting.

Initially, the respondents point out that Fourth Amendment analysis cannot apply to petitioner's argument since he was not seized at the time officers Entrekin, Jackson and Wadley committed their allegedly tortious acts. Fourteenth Amendment standards should be applied.

Secondly, the intervening actions of officers Ferguson and Hayes break an already tenuous chain of causation that the petitioner uses to link the actions of Entrekin, Jackson and Wadley to his being shot in the leg. The result is simply not foreseeable.

Respondents can imagine only one scenario that would allow for an assignment of liability under 42 U.S.C. § 1983 and the Fourteenth Amendment — conspiracy among officers Entrekin, Jackson and Wadley to have the petitioner shot by officers such as

Ferguson and Hayes. While such a charge would make for a good suspense novel, the petitioner has never produced any facts that would support such a claim.

III.

PETITIONER'S CLAIM OF A CODE OF SILENCE IS IRRELEVANT SINCE NO UNDERLYING CONSTITUTIONAL VIOLATION EXISTS.

The petitioner has abandoned his argument that the actions of officers Ferguson and Hayes violated his constitutional rights protected under the Fourth Amendment. Without an underlying constitutional violation there can be no basis for municipal liability. Therefore, petitioner's argument that the City of Atlanta should be held liable for tolerating a code of silence within the police department is moot. Moreover, the petitioner has never produced any facts that would suggest that a code of silence exists outside of the parameters of this one particular case.

REASONS FOR DENYING THE WRIT AS TO LIEU UY

Petitioner Lieu Uy was never criminally charged, nor prosecuted for criminal conduct. Therefore, petitioners' argument based upon *Albright v. Oliver* is irrelevant to Petitioner Lieu Uy's claims. Regarding petitioners' second argument that officers Entrekin, Jackson and Wadley should be held liable for the actions of other police officers because they created the situation in which the other officers had to function, respondent City of Atlanta adopts its argument on this issue presented in Svay, *supra.* What remains is petitioners' claim that a code of silence led to the beating suffered by Lieu Uy.

I.

PETITIONER FAILS TO DEMONSTRATE THAT A CODE OF SILENCE EXISTS AS A CUSTOM WITHIN THE ATLANTA POLICE DEPARTMENT AND FAILS TO DEMONSTRATE THAT A CODE OF SILENCE WAS THE MOVING FORCE BEHIND HIS INJURIES.

Assuming *arguendo* that petitioner has produced facts that would tend to show that a "code of silence" operated during the investigation by the Office of Professional Standards, (Internal Affairs), into the claims made by the petitioner that he was beaten by City of Atlanta Police Officers, he has completely failed to establish that a code of silence exists as a custom within the police department. The record is devoid of any fact that would prove such a claim. Moreover, the petitioner has never met his burden of showing that a code of silence, if such a creature exists, is indicative of some inadequacy in the way the Atlanta Police Department either trains, supervises or disciplines its officers, or that such an inadequacy was the moving force behind his beating.

CONCLUSION

In both of the cases presented in the Petition for Writ of Certiorari, the petitioners have asserted arguments that are not supported by the facts, and petitioners' claims against officers Entrekin, Jackson and Wadley are simple overreaching. For all of the foregoing reasons, the respondents request this Court to deny the petition for Writ of Certiorari.

Respectfully submitted,

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